

South Carolina Bar Judicial Independence and Impartiality Committee

I. GOAL

The South Carolina Bar's Judicial Independence and Impartiality Committee's mission is to provide appropriate and timely responses to criticism of judges and courts.

II. WHY IS JUDICIAL INDEPENDENCE IMPORTANT?

Independent courts protect our freedoms, which are guaranteed by the U.S. Constitution. The written rights would mean little without independent and impartial courts to protect them. An independent judiciary—the third and co-equal branch of government—acts fairly, is grounded in the rule of law and free from outside control or influence. Courts and judges are accountable to the Constitution and laws—not ideologies, special interests or individuals. This framework, developed by our nation's founders, guarantees that independent courts and judges remain faithful to the rule of law. When criticism of judges' rulings reflects misunderstanding of the legal system or crosses the line into personal attacks or intimidation, public respect for our justice system is undermined. This creates a threat to justice, the rule of law, our constitutional democracy, and freedom in general.

III. COMMITTEE PURPOSES AND FUNCTIONS

The Committee promotes the importance of an independent judiciary by:

- Responding to unjust criticism when rules of conduct prevent individual judges from making public statements;
- Addressing inaccuracies and misinformation reporting criticism of judges and courts;
- Serving as a resource for unbiased information concerning judicial activities and court process; and
- Educating the public on the role of judges and lawyers in our democracy.

IV. GUIDELINES TO DETERMINE WHEN THE COMMITTEE SHOULD RESPOND TO CRITICISM OF JUDGES

A public response should be made to criticism or attacks on judges and/or the courts in the following instances:

- A public utterance that is unwarranted or an unjust attack on a judge in relation to specific cases, regardless of the source of the attack, or
- Any unwarranted or unjust attack or series of attacks on a judge or court that may adversely affect the administration of justice.

Factors for consideration in determining whether to respond to criticism:

- Whether a response would serve a public information service and not appear to be petty;
- Whether the criticism will be adequately met by a response from some other appropriate source;
- Whether the criticism substantially and negatively affects the judiciary or other parts of the legal

system, or whether continuing discussion of the controversy would serve to lower public perceptions as to the dignity of the court, the judiciary, or the judicial system;

- Whether the criticism is directed at a particular judge but unjustly reflects generally on the judiciary or the court or lawyers;
- Whether a response provides the opportunity to inform the public about an important aspect of the administration of justice (e.g., evidence rules, due process, fundamental rights, etc.);
- Whether the critic is so obviously uninformed about the judicial system that a response can be made on a factual basis;
- Whether the criticism or report, although generally accurate, does not contain all or enough facts about the reported event or procedure to be fair to the judge or matter being criticized;
- Whether the overall criticism is not justified or fair;
- Whether the judge or court which is the subject of the criticism authorizes the making of a response.

The following are the kinds of cases in which response to criticism IS NOT appropriate, except in unusual circumstances:

- When the judge or the court which is the subject of the criticism declines the offer of the Committee to respond;
- When the Executive Committee of the Board of Governors declines to authorize the making of a response.
- When the criticism is a fair comment or opinion;
- When the criticism is between the critic and the judge on a personal level;
- When the criticism is vague or the product of innuendo, except when the innuendo is clear;
- When the criticism raises issues of judicial ethics appropriate for presentation to the Office of Disciplinary Counsel or Commission on Judicial Conduct;
- When a lengthy investigation would be necessary to develop the facts;
- When the response might prejudice a matter at issue in a pending proceeding;
- When the controversy is insignificant;
- When the criticism arises during judicial selection and the response may be construed as an endorsement of a particular candidate for judicial office.

V. THE TIMING, FORM, DRAFTING CONSIDERATION AND CONTENT OF THE RESPONSE

Timing

- To be effective, the response must be prompt and accurate and, if possible, should be made within 24-48 hours or as soon as practicable.
- When aware that unwarranted criticism will be made or reported, direct communication with a reporter or editor may clarify the facts and serve to defuse the situation.

Form of Response

- The form and manner of the response should be such that it will receive the same exposure as the criticism. The decision to respond will be made in consultation with the judge(s) who is subject of the criticism.
- A letter to the editor or op-ed is an effective form of response because it is the most likely to be printed fully and accurately.
- Posting a response on the Bar's owned channels, including but not limited to the Committee's website and Bar social media channels, should be considered.
- Press releases are usually more subject to editing and are frequently viewed as less credible.
- Television or radio talk shows by on-air appearance or interviews through video conference may be effective forms of response but should be used carefully.
- In some circumstance, press conferences or one-on-one interviews with editors and reporters provide effective means to disseminate a response.
- Direct communication with reporters and editors intended to clarify facts and present another position is encouraged.
- Whenever possible, any response should be coordinated with the South Carolina Judicial Branch's public information officer and/or appropriate contacts at the Judicial Branch.
- Whether a response would appear defensive or self-serving.
- Ordinarily the response should come from the Committee, speaking on behalf of the South Carolina Bar. However, the Executive Committee of the Board of Governors and the Chief Justice or his designee should be consulted to determine whether they wish to issue their own response or participate in the Committee's response.

Drafting Considerations

- The response should be a concise, accurate, "to-the-point" statement, devoid of emotional, inflammatory, or subjective language;
- The statement should be informative and not argumentative or condescending;
- The statement should include a correction of the inaccuracies, citing facts and relevant authorities where appropriate;
- The statement should be written in plain language, suitable for inclusion in a newspaper story;
- Where appropriate, the statement should include the point that the judge had no control or discretion (e.g., decision required by state law);
- Where appropriate, the statement should include an explanation of the process involved;
- The statement should NOT attempt to discredit the critic; that is, attack the competence, good faith, motives, or associates of the critic;
- The statement should not provide evidence that the critic has hit a nerve, causing overreaction;
- The statement should not defend the indefensible;
- The team should consider the cause of the criticism or controversy, which might not be immediately apparent.

Content of Response:

The following points may be included in a typical response:

- Identify the criticism and its source.

- We may frequently disagree with the decisions and actions of public officials, including judges. The federal and state constitutions protect our right to express our disagreement.
- We must remember that judges have no control over which cases come before them, but they must decide each and all of those cases. Judges must follow the law as established by higher courts. One side loses in every lawsuit.
- Because of their position(s), judges are not free to defend themselves against criticisms which are based on their decisions.
- Lawyers, under the Code of Professional Responsibility and the Model Rules of Professional Conduct, have a duty to defend judges against unjust criticism.
- Avoid taking a position on the merits of the controversy, since to do so will probably eliminate any educational benefit that the balance of the points might have for those who agree with the criticism.